The Majority's Memorandum of Observations

The Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct (the "Committee") makes the following observations about its April 30 , 2008 draft of a proposed revised version of Canon 3B(9):

The Committee believes that the current version of Canon 3B(9) of the Code of Judicial Conduct, which became effective on October 1, 2003, does not provide sufficient guidance to judges. The recommended revisions aim to achieve greater clarity. The Committee recognizes, however, that it is impossible to draft a code that specifically addresses every factual situation that may arise.

ABA Canon Permitting Comment on Pending and Impending Cases Not Reasonably Expected to Affect the Outcome or Impair the Fairness of a Matter

The Committee chose not to adopt the more permissive language in ABA Rule 2.10 of Canon 2 dealing with Judicial Statements on Pending and Impending Cases. Rule 2.10(A) prohibits a judge from making any "public statement" about a pending or impending case "that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court" or from making any "nonpublic statement that might substantially interfere with a fair trial or hearing." The Committee believes that the ABA language provides insufficient guidance as to what type of speech specifically is permitted in a host of situations and might, therefore, unnecessarily chill a judge's speech.

Speech During Judicial Proceedings and in Judicial Memoranda

Judges traditionally speak from the bench and through their memoranda. The Committee believes that the prohibition of public comment on pending and impending cases should not apply to speech during the course of a judicial proceeding in a case or to a written memorandum of decision or order entered on the docket of a case. Accordingly, the proposed canon makes this explicit by defining the phrase "public comment" as not including such speech. The Committee is of the view that speech contained in a memorandum filed in a case is fundamentally different from speech at a press conference or in a private interview with a reporter, in a television interview, or written in a letter to the editor and that the public is well served by judges clearly and comprehensively explaining their decisions on the record to the parties and the public. Although there are many instances in which a judge may deem it impractical, unreasonable, or unnecessary to issue a written decision at the time an order is rendered, in some cases, a judge's failure to provide a full explanation on the record of a ruling risks public misunderstanding, promotes uninformed controversy, and engenders lack of confidence in the judiciary.

The existing canon states that "[a] judge is permitted to make public statements in the course of his or her official duties." Nevertheless, judges are uncertain whether, after a ruling has been made, they may explain the rationale for their ruling in a written memorandum filed in the case. The proposed commentary is intended to clarify that this canon permits a judge to supplement the court record by issuing a written memorandum explaining his or her reasons for judicial action previously

taken. The proposed commentary also states that a judge may do so "at any time" because it was deemed that such speech is never the type of public comment on pending and impending cases designed to be regulated by this canon, because it appears unworkable to formulate a precise time frame when issuance of a written memorandum appropriately should become prohibited public comment, and because nothing in the canon abrogates jurisdictional rules that may constrain a judge's ability to enter a post-judgment written memorandum on the docket of a case.

The proposed revision does not require a judge ever to issue a supplemental memoranda in the face of public criticism, but the Committee recognizes a judge no longer would be able to explain the absence of an explanation for a ruling by claiming that he or she is barred from doing so by Canon 3B(9). The prospect of public criticism of judges who decline to take advantage of the new rule appears to the Committee to pose far less a problem than erosion of support for and respect of the judiciary generated by enforced silence. The Committee concluded that the benefits of clarifying the canon to make it clear that judges who wish to explain a ruling to the public may do so after the ruling by issuing a supplemental memorandum outweighs the benefit of allowing those judges who choose not to issue such a memorandum the benefit of claiming an ethical prohibition. The Committee believes that judges, in deciding whether and when to issue a supplemental memorandum, should be trusted to apply the prudence, good sense, and sound judgment that we expect them to apply in other aspects of decision-making. In short, the question of whether it is wise to issue a supplemental memorandum to explain a criticized ruling is now left to the judge's sound discretion, not an ethical rule.

The Committee is mindful that removing speech during judicial proceedings and in judicial decisions from the purview of Canon 3B(9) does not leave judicial speech unregulated by the Code of Judicial Conduct. As the preamble to the Code of Judicial Conduct makes clear, Section 2A, which provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," overrides any specific authorization to act found elsewhere in the Code. The preamble cautions that "before concluding that an action appears to be permitted by one of the more detailed provisions of the Code, the judge should consider whether, in the circumstances, the action is improper when measured against a more general provision, for instance, Section 2A." The Committee believes that the issuance by a judge of an opinion in response to public criticism would not violate Canon 2. The possibility that Canon 2 could be so interpreted, however, may create uncertainty and, therefore, the Committee has included language in the commentary to the effect that Canon 2 does not prohibit a memorandum of decision from being issued, even in response to public criticism, when that memorandum is basely solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not the reasoning previously was articulated. The commentary also includes the caution that a memorandum of decision that intentionally misstates the record or the judge's rationale for the decision would violate Canon 2. The proposed commentary also contains a cross-reference to Canon 3B(7), the general obligation not to consider ex parte communications, because of the possibility that public criticism may trigger a judge's decision to issue a supplemental decision.

Response to Criticism of a Judge's Conduct

The ABA amended its Model Code of Judicial Conduct in 2007 to add language permitting a judge to "respond directly or indirectly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." The Committee agrees that judges should be able to defend their conduct and, accordingly, have proposed a new subsection (d) allowing a judge to make a public comment, directly or through a third party, concerning his or her conduct provided that such statements do not reasonably put into question the judge's impartiality and do not address the merits of any judicial decision. Although the proposed revision would permit a judge to respond to allegations in the media about the manner in which a judge behaves, the Committee does not believe it is necessary to refer specifically to the media. The Committee is concerned that doing so might create a perception, on the part of the media, that they are entitled to demand a response from a judge. The proposed commentary does not require that the response be made by a third party, but does recommend that the judge consider whether it may be preferable for a third party to respond.

Education Exemption

The Committee believes that the difference in wording between Canon 4B and Canon 3B(9)(b) makes the scope of the education exemption confusing. In particular, Canon 3B(9)(b) currently permits public comment about cases and issues in appellate courts in the context of legal education programs and materials but not in other types of equivalent forums or writings. Canon 4B, on the other hand, provides that "[s]ubject to the requirements of this Code, a judge may speak, write, lecture and teach concerning legal and nonlegal matters and may participate in legal and nonlegal activities." Because Canon 4B is subject to the general prohibition on public comment and because the public comment exemption mentions fewer permitted contexts for speaking about cases pending in appellate courts than Canon 4B, the Committee recommends that the education exemption be revised to permit a judge to speak, write, or teach about cases and issues in appellate courts when such comments are made in scholarly presentations and related materials, or learned treatises, academic journals and bar publications in addition to legal education programs and materials.

The existing education exemption is limited to statements about cases and issues in appellate courts, and the Committee recommends no change in this regard. Removal of this restriction would create the potential of judges engaging in what may be perceived as unseemly discussions about their own colleagues' decisions. The Committee also recommends no change in the second sentence of the existing exemption and believes that, in the context of the speech being addressed in this exemption, the statement that the "education exemption does not apply to comments or discussions that might interfere with a fair hearing of the case" provides as much guidance as is feasible.

The Committee recognizes that speech by a judge in an educational context may circulate to a wider audience than the judge intended or contemplated given the ease, in this day and age, of electronic transmissions and the world wide web. The Committee concluded that prohibiting educational speech that might be made available to a general audience would eviscerate the educational exemption and that the second sentence of paragraph 9(b) is sufficient to meet concerns

about any adverse impact on pending cases.

The Majority's Proposed Revisions to Canon 3B(9) of the Code of Judicial Conduct

(9) Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending Massachusetts proceeding in any court, and shall require* similar abstention on the part of court personnel*. A judge does not engage in public comment when he or she speaks during any judicial proceeding in a case or when he or she issues a written memorandum of decision or order entered on the docket of a case.

> (a) A judge is permitted to make public statements in the course of his or her official duties or to explain for public information the procedures of the court, general legal principles, or what may be learned from the public record in a case.
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> (b) This Section does not prohibit judges from speaking, writing, or teaching about cases and issues in appellate courts when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals and bar publications. This education exemption does not apply, however, to comments or discussions that might interfere with a fair hearing of the case.
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> (c) This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.
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> (d) This Section does not prohibit a judge, directly or though a third party, from making public comment concerning his or her conduct provided that such statements do not reasonably put into question the judge's impartiality and do not address the merits of any judicial decision.

Commentary to Section 3B(9):

The requirement that a judge abstain from public comment regarding a pending

proceeding continues during any appellate process and until final disposition. A case is impending for purposes of this section if it seems probable that a case will be filed, if charges are being investigated, or if someone has been arrested although not yet charged. This rule does not require a judge to abstain from public comment about a Massachusetts proceeding that is not pending or impending.

"Any court" for purposes of this section means any state or federal court within the United States or its territories.

Public comment does not include any oral statements made by a judge during a judicial proceeding in a case or any written memorandum of decision or order entered on the docket of a case. Accordingly, a judge, at any time, may supplement the court record by a written memorandum explaining his or her reasons for judicial action. For example, to educate the public, if he or she deems it appropriate, a judge may choose to issue a written memorandum in order to articulate in greater detail the rationale for the judge's action at the time that action was taken, but the general obligation not to consider ex parte communications still applies. See Canon 3B(7). Canon 2 does not prohibit a memorandum of decision from being issued, even in response to public criticism, when that memorandum is based solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not that reasoning previously was articulated. By contrast, a memorandum of decision that intentionally misstates the record or the judge's rationale for the decision would violate Canon 2.

Public comment includes any other oral or written statement made publicly by the judge. A judge may, consistent with this section, make public statements about a pending or impending case in the course of his or her official duties. "In the course of his or her official duties" includes statements made by a judge in the performance of his or her administrative duties.

In addition, in making public comments outside the course of his or her official duties, such as when speaking to a member of the press or the general public, a judge may, consistent with this section, explain what may be learned from the public record in a case, including pleadings, documentary evidence, and the tape recording or stenographic record of proceedings held in open court. Speaking to a journalist is public comment even where it is agreed that the statements are "off the record." See also Section 3B(11).

"Conduct" as used in subsection (d) refers to the manner in which a judge

behaves and not the substance of a judge's rulings. For example, an allegation that the judge consistently fails to work a full day is an example of conduct contemplated by subsection(d). The judge would be precluded from discussing the merits of any case, and the judge should be mindful that a response not raise a concern about that judge's ability to decide similar cases in the future. The authorization to comment on criticism of conduct is permissive; there is no requirement that a judge respond to allegations in the media or elsewhere. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue a statement in connection with allegations concerning a judge's conduct.